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IN THE

Supreme Court of the United States

October Term, 1970

No. 944

ARMCO STEEL CORPORATION,
Petitioner,

and

HONORABLE EDWARD DUMBAULD, Judge, United States District Court for the Western District of Pennsylvania,
Nominal Petitioner,

v.

NANCY SCHUTTE, ADMINISTRATRIX; ACE DORAN HAULING & RIGGING COMPANY,

and

TIPPINS MACHINERY COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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v.

NANCY SCHUTTE, ADMINISTRATRIX; ACE DORAN HAULING & RIGGING COMPANY,

and

TIPPINS MACHINERY COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 14, 1970.

Opinion Below

The opinion of the Court of Appeals, presently unreported, appears in the Appendix hereto, together with the

two Orders entered by the District Court. No Opinion was written by the United States District Court for the Western District of Pennsylvania.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on August 14, 1970. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. Sec. 1254(1).

Questions Presented

1. Whether resort to 28 U. S. C. Sec. 1292(b) is a necessary pre-condition to invocation and issuance of the Writ of Mandamus.

2. Whether the District Court truly committed, clearly and indisputably, a judicial usurpation of power that infringed a positive legal right of the respondent-plaintiff, and in the requisite "really extraordinary" context.

3. Whether change of venue orders are subject to *de novo* or other review on mandamus, simply because the Court of Appeals so disagrees with the District Judge's exercise of discretion that it characterizes the District Judge's determination as an "abuse of discretion".

Statutory Provisions Involved

United States Code, Title 28:

Sec. 1651(a). Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Sec. 1404(a). Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a District Court may transfer any civil action to any other district or division where it might have been brought.

Sec. 1292(b). Interlocutory decisions

(b) When a District Judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, *if application is made to it* within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Statement of the Case

The Tippins Machinery Company of Etna, Pennsylvania, purchased various pieces of used machinery from the Armco Steel Corporation Plant located in Kansas City, Missouri. Plaintiff's decedent, a Tippins employee, was dispatched to Kansas City to inspect the items purchased and to arrange for their carriage from Kansas City (Western District of Missouri) to Etna (Western District of Pennsylvania).

On May 29, 1959, a tractor-trailer owned and operated by Belger Cartage Service, Inc., Missouri-based, appeared at Armco's Kansas City Plant to pick up the equipment. Belger Cartage Service did not possess I. C. C. authority east of Illinois. At a point in Illinois, the tractor-trailer opera-

tor would, as he subsequently did, place Ace Doran Hauling & Rigging Company decals on his unit and thereafter complete the interstate journey to Pennsylvania under I. C. C. operating rights of Ace Doran Hauling & Rigging Company. The record indicates that all contractual arrangements for interstate carriage of the used machinery were consummated within the State of Missouri.*

Present during the loading process were the tractor-trailer operator, three Kansas City-based Armco employees, and the plaintiff's decedent. The loading took place inside one of the Armco Buildings and necessarily involved the use of the building's overhead crane. Under I. C. C. regulations and the applicable case law, the common carrier bears the primary responsibility for safe and proper loading.

During the loading process, plaintiff's decedent sustained fatal injuries when a heavy piece of machinery previously positioned on the trailer flatbed as directed by the tractor-trailer operator, for some reason tumbled down onto plaintiff's decedent as he stood alongside. Plaintiff alleges that some operation of the overhead crane caused or contributed to the mishap. Armco alleges that if anyone is liable to the plaintiff, Belger Cartage Service is solely or concurrently liable, or liable over by means of indemnification.

That same day, loading of the machinery was completed. The tractor-trailer operator hauled the machinery from Missouri into Pennsylvania consonant with the prior arrangements between Armco and Tippins, on the one hand, and Tippins, Belger Cartage Service, Inc. and Ace Doran Hauling & Rigging Company, on the other.

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* See V. A. M. S. Sec. 506.500, in Appendix (p. 27).

Plaintiff, a Pennsylvania citizen, duly commenced Civil Action No. 69-874 in the United States District Court for the Western District of Pennsylvania, naming Armco and Ace Doran Hauling & Rigging Company, citizens of Ohio, as co-defendants. Jurisdiction was asserted under 28 U. S. C. Sec. 1332. Armco joined Tippins Machinery Company as a third-party defendant. Some five months after commencement of the action and seven months following the fatal accident, Armco moved to change the venue of Civil Action No. 69-874 to the Western District of Missouri pursuant to 28 U. S. C. Sec. 1404(a). A primary purpose of the motion was to move the litigation to a forum where Belger Cartage Service could successfully be joined. Belger is *not* a party to either No. 69-874 or No. 70-206. The motion was assigned to Honorable Edward Dumbauld, the Nominal Petitioner. *While the said motion was pending decision* on briefs and affidavits, plaintiff suddenly instituted a new action in the State Courts of Pennsylvania against Armco *alone*. Plaintiff chose not to litigate against Ace Doran Hauling & Rigging Company and Tippins Machinery Company in this new State Court action. This State Court action was removed to the United States District Court for the Western District of Pennsylvania, 28 U. S. C. Secs. 1332 and 1441(a), where it became Civil Action No. 70-206. Armco then moved to change the venue of Civil Action No. 70-206 to the Western District of Missouri.

Though Armco's motion for change of venue of Civil Action No. 70-206 was unaccountably assigned to a different District Judge, the Nominal Petitioner was made aware of the pendency of the 1404(a) motion in the new suit and was made aware also of the fact that plaintiff had chosen to litigate against Armco alone in the new lawsuit.

In spite of the respondent-plaintiff's contention that Civil Action No. 69-874 could not be transferred to the Western District of Missouri because the proposed transferee court allegedly did not possess venue (but see, 28 U. S. C. Sec. 1391(a)) and personal jurisdiction as to Ace Doran and Tippins, the Nominal Petitioner, who was well aware of the plaintiff's demonstrated lack of interest in litigating against Ace Doran & Tippins in Civil Action No. 70-206, based on the identical accident, ordered No. 69-874 transferred to the Western District of Missouri under the provisions of 28 U. S. C. Sec. 1404(a). The respondent-plaintiff promptly filed a petition for re-hearing which reiterated and enlarged her objections to the transfer. This petition was duly considered and denied. The Nominal Petitioner did not write any opinion.

The respondent-plaintiff thereupon petitioned the United States Court of Appeals for the Third Circuit to issue a Writ of Mandamus directing the Nominal Petitioner to vacate the order of transfer. The matter was considered by the Court of Appeals on oral argument, following the submission of typewritten briefs and certified copies of the materials which had been filed of record or otherwise submitted in Civil Actions Nos. 69-874 and 70-206. The Appendix hereto contains a verbatim recitation of the Issues Presented in Armco's Brief in the Third Circuit opposing the writ of mandamus sought by plaintiff (pp. 25, 26). As will be observed from a reading of the Court of Appeals opinion (pp. 17-22), the Court below did not cope with Issues "A", "B" and "F"; and *inferentially* decided Issues "C" and "D" adversely to your Petitioner.

Following the procedure outlined in *Rapp vs. Van Dusen*, 350 F. 2d 806 (3d Cir. 1965), the Nominal Petitioner has refrained from any active participation in these mandamus proceedings.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the guidelines and limitations established by this Court and by the decisions of other Courts of Appeals in respect to issuance of Writs of Mandamus, and impermissibly promotes liberal de novo review of interlocutory orders in change of venue cases.

The peremptory and extraordinary writ of mandamus has statutory sanction in 28 U. S. C. Sec. 1651(a). It has traditionally been used in the Federal Courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. It is clear that only *exceptional circumstances* amounting to a judicial "usurpation of power" will justify invocation of this extraordinary remedy. *Will vs. United States*, 389 U. S. 90; *Bankers Life & Casualty Co. vs. Holland*, 346 U. S. 379; *American Flyers Airline Corp. vs. Farrell*, 385 F. 2d 936 (2d Cir. 1967), *cert. denied* 390 U. S. 1012. Assuming that other requisites are satisfied, the writ may issue to a lower court which has acted in a matter *entirely beyond and outside of its jurisdiction*, but does not have justification if the most that could be claimed is that the District Court has erred in ruling on a matter within the scope of its jurisdiction. *Chandler vs. Judicial Council*, 398 U. S. 74, 114; *Bankers Life & Casualty Co. vs. Holland, supra.; Will vs. United States, supra.; Platt vs. Minnesota Mining & Mfg. Co.*, 376 U. S. 240. The Writ does not issue, either, in routine accident cases, but only in "really extraordinary" causes. *Will vs. United States, supra; American Flyers Airline Corp. vs. Farrell, supra.; In re GAF Corp.*, 416 F. 2d 1252 (1st Cir. 1969); *Cf. Zerilli vs. Thornton*, 428 F. 2d 476 (6th Cir. 1970).

The Court of Appeals purported to find authority for its action in *Van Dusen vs. Barrack*, 376 U. S. 612 and *Hoffman vs. Blaski*, 363 U. S. 335. The short answer is that none of this Court's cases have dealt with the issues involved here in a Sec. 1404(a) setting. In *Van Dusen vs. Barrack*, *supra*, this court exercised its supervisory powers so as to outline various meaningful criteria for the guidance of District Courts in future Sec. 1404(a) proceedings. *Cf. Schlagenhauf vs. Holder*, 379 U. S. 104. Because this Court had occasion in that case to reverse the Court of Appeals for the Third Circuit, it did not have to deal with the Government's contention that the Third Circuit had improperly granted mandamus. 376 U. S. 612, 615, n. 3. The issue was not presented in *Norwood vs. Kirkpatrick*, 349 U. S. 29, 33 or in *Hoffman vs. Blaski*, 363 U. S. 335, 340. Your Petitioner submits that the instant case is ruled by *Platt vs. Minnesota Mining & Mfg. Co.*, *supra*, and *Bankers Life & Casualty Co. vs. Holland*, *supra*, the language and disposition of which compel the conclusion that the Court of Appeals for the Third Circuit erred here in granting mandamus to the respondent-plaintiff.

Issue "B" presented to the Court of Appeals by your petitioner invited the Court of Appeals to withhold equitable relief in the nature of mandamus because the respondent-plaintiff's primary substantive objection to change of venue—the alleged non-transferability of Civil Action No. 69-874 as to Ace Doran and Tippins—deserved no consideration in light of the respondent-plaintiff's determination to litigate against your petitioner *only* in the State Court action that subsequently became Civil Action No. 70-206. In support of its proposition that respondent-plaintiff's claim to equitable mandamus relief was undermined by her demonstrated lack of interest in litigating against Ace

Doran and Tippins, your petitioner cited the following cases, *inter alia: Whitehouse vs. Illinois Central R. Co.*, 349 U. S. 366; *Ackert vs. Bryan*, 299 F. 2d 65 (2d Cir. 1962). *Compare: Van Dusen vs. Barrack, supra*, p. 623. Regrettably, the Court of Appeals did not touch on this issue in its opinion of August 14, 1970. The fact that it did not is additional evidence that the Court of Appeals misapprehended and misapplied the doctrine of mandamus.

The weighing of the relative conveniences of the parties and witnesses and the concomitant determination of which federal forum is favored by the balance of convenience and the interest of justice, is a matter peculiarly committed to the discretion of the trial court. Courts of Appeals are to abstain from any *de novo* consideration of the relative conveniences and inconveniences involved. *Platt vs. Minnesota Mining & Mfg. Co., supra; Times, Inc. vs. Manning*, 366 F. 2d 690 (5th Cir. 1966); *A. Olinick & Sons vs. Dempster Bros.*, 365 F. 2d 439 (2d Cir. 1966) (concurring opinion of Judge Friendly); *United States vs. Wright*, 282 F. 2d 428 (3d Cir. 1960, *en banc*); *All States Freight, Inc. vs. Modarelli*, 196 F. 2d 1010 (3d Cir. 1952, *en banc*). In the instant case, the Court of Appeals purported to undertake its independent *de novo* review of the merits of the transfer order on the basis that the Nominal Petitioner had not filed an opinion discussing his findings and conclusions. *But Cf. Westinghouse Electric Corp. vs. Weigel*, 426 F. 2d 1356 (9th Cir. 1970). Under the decisions of This Court and of other Courts of Appeals, the Court of Appeals for the Third Circuit did not have this prerogative. If it was of the view that findings of fact and conclusions of law were truly indispensable, a proposition which is dubious at best, then its sole function was to remand the case to the

District Court for such findings and conclusions. *Cf. Platt vs. Minnesota Mining & Mfg. Co., supra.*

The Court of Appeals purported to find an abuse of discretion by the District Court. In doing so, the Court of Appeals permitted itself to be misled into the interlocutory review of a non-appealable order on the mere ground that it might be erroneous. *American Flyers Airline Corp. vs. Farrell, supra.*, quoting from *Will vs. United States*, 389 U. S. 90, 98. The three-judge panel of the Court of Appeals also violated the guidelines laid down by the Court of Appeals *en banc* in *All States Freight, Inc. vs. Modavelli*, and *United States vs. Wright, supra.* The "abuse of discretion" criterion was clearly inappropriate in this case, *Bankers Life & Casualty Co. vs. Holland, supra*, and calls to mind Judge Friendly's observation that:

> "A lawyer who is ready to say that a District Judge has abused his discretion will not boggle over the adjective, and application of the standards constantly being proliferated for review of orders of district judges—error, clear error, abuse of discretion, now clear-cut abuse of discretion, requires a mind more sensitive than mine." 365 F. 2d 439, at p. 447.

The Court of Appeals misinterpreted and misapplied the principles of mandamus; ignored various significant issues before it; and acted beyond the scope of its powers in rendering a *de novo* adjudication of the transfer order. Furthermore, the Court of Appeals purported to question the constitutionality of the Missouri Long-Arm Statute under which Armco contended that Ace Doran Hauling & Rigging Company and Tippins Machinery Company were subject to personal jurisdiction within the Western District of Missouri, thereby failing to accord Full Faith and Credit to the Missouri Statute.* Two months prior to the decision of

* The Court of Appeals did not specifically challenge Armco's Argument that the statute conferred jurisdiction under the assumed facts. The relevant portions of the statute, V. A. M. S. Sec. 506.500, are set out in the Appendix (p. 27).

the Court Below, the statute was held constitutional. State of Missouri *ex rel.* Deere and Co. vs. Pinnell, 454 S. W. 2d 889 (Mo. Supreme Ct. 1970). For all of these reasons, we submit that the Court Below erred.

The decision below conflicts with decisions of other Courts of Appeals and with the prior *en banc* decision in *Rapp v. Van Dusen*, 350 F. 2d 806 (3d Cir. 1965), in rejecting resort to 28 U. S. C. Sec. 1292(b) as a pre-condition to mandamus proceedings.

The Court Below ignored your petitioner's argument that the respondent-plaintiff should have proceeded pursuant to 28 U. S. C. Sec. 1292(b) as a pre-condition to seeking mandamus. In doing so, the Court of Appeals dispensed with its own requirement that petitions for mandamus demonstrate the unavailability of 28 U. S. C. Sec. 1292(b) as a means of alternative relief, *Rapp vs. Van Dusen*, 350 F. 2d 806, 813 (3d Cir. 1965); and implicitly held that Sec. 1292(b) relief need not be sought as a prelude to mandamus proceedings. This holding is in conflict with the reasoning of the Courts of Appeals for the Second Circuit, *Farrell vs. Wyatt*, 408 F. 2d 662, 665 (2d Cir. 1969), and of the Sixth Circuit, *Panhandle Eastern Pipelines vs. Thornton*, 267 F. 2d 459 (6th Cir. 1959). Your petitioner requests This Court to review and determine this issue under its supervisory powers over the Federal Courts, since the matter is one of primary importance to the proper functioning of mandamus and interlocutory appeal procedure.

Conclusion

In recent years, three-Judge panels of the Court of Appeals for the Third Circuit have persistently strayed from the mandamus guidelines established by This Court and by its own *en banc* decisions in *All States Freight, Inc. vs. Modarelli* and *United States vs. Wright, supra.* See also *Mutual Life Insurance Company vs. Ginsburg*, 228 F. 2d 881 (3d Cir. 1956), in which the Court of Appeals specifically declined to review by right of mandamus the Lower Court's *power* to make a transfer order. For recent other examples of the Third Circuit's thinking, see *Jewell vs. Ohio River Company*, ____ F. 2d ____ (3d Cir., Aug. 21, 1970); *McDonnell Douglas Corp. vs. Pollin*, 429 F. 2d 30 (3d Cir. 1970); *Texaco, Inc. v. Borda*, 383 F. 2d 607 (3d Cir. 1967); and *Buffington vs. Wood*, 351 F. 2d 292 (3d Cir. 1965).

For the above stated reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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October , 1970.

APPENDIX

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 18,753.

NANCY SCHUTTE, Administratrix of the Estate of Richard K. Schutte, Deceased,

Petitioner.

vs.

ARMCO STEEL CORPORATION,

(Defendant & Third Party Plaintiff).

and

ACE DORAN HAULING & RIGGING COMPANY, a corporation,

(Defendant).

vs.

TIPPINS MACHINERY COMPANY, INC., a Pennsylvania corporation,

(Third Party Defendant).

and

BELGER CARTAGE SERVICE, INC., a foreign corporation,

(Third Party Defendant),

Respondents.

HONORABLE EDWARD DUMBAULD, United States District Judge,

Nominal Respondent.

Writ of Mandamus

United States of America, Third Judicial Circuit ss.:

To the Honorable Edward Dumbauld, Judge of the United States District Court for the Western District of Pennsylvania, GREETINGS:

WHEREAS, the Honorable Edward Dumbauld by order of February 16, 1970, transferred the case of Nancy Schutte, Administratrix of the Estate of Richard E. Schutte, Deceased vs. Armco Steel Corporation, Defendant and Third Party Plaintiff and Ace Doran Hauling and Rigging Co., a corporation, Defendant vs. Tippins Machinery, Co., Inc., a Pennsylvania corporation, Third Party Defendant to the Western District of Missouri at Kansas City, Missouri; and

WHEREAS, Nancy Schutte, Administratrix of the Estate of Richard K. Schutte, Deceased, on March 24, 1970, filed a petition in this Court for writ of mandamus to the Honorable Edward Dumbauld, Judge of the United States District Court for the Western District of Pennsylvania to vacate and set aside the said transfer order of February 16, 1970; and

WHEREAS, the respondents Armco Steel Corporation and Tippins Machinery Company, Inc. have filed answers to the petition; and

WHEREAS, the matter came on to be heard before this Court on the aforesaid petition and answers, and on briefs; and

WHEREAS after due deliberation thereon this Court rendered its opinion, filed this day, that the Honorable Edward Dumbauld abused his discretion in ordering the transfer of the said case; and

WHEREAS the said opinion of this Court directed that the writ of mandamus, as prayed for by the petition, will issue, directing the respondent judge to vacate and set aside the transfer order of February 16, 1970:

NOW THEREFORE THE NOMINAL RESPONDENT, THE HONORABLE EDWARD DUMBAULD IS HEREBY REQUIRED AND COMMANDED, immediately after the receipt of this writ and without delay to vacate and set aside the order of February 16, 1970 in Civil Action No. 69-874.

THOMAS F. QUINN,
Clerk of the United States Court of Appeals for the Third Circuit.

Dated: August 14, 1970.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18,753.

NANCY SCHUTTE, Administratrix of the Estate of Richard K. Schutte, Deceased,

Petitioner,

v.

ARMCO STEEL CORPORATION,

Defendant & Third Party Plaintiff,

and

ACE DORAN HAULING & RIGGING COMPANY, a corporation,

Defendant,

v.

TIPPINS MACHINERY COMPANY, INC., a Pennsylvania corporation,

Third Party Defendant,

and

BELGER CARTAGE SERVICE, INC., a foreign corporation,

Third Party Defendant, Respondents,

HONORABLE EDWARD DUMBAULD, United States District Judge,

Nominal Respondent.

ON PETITION FOR WRIT OF MANDAMUS

Argued June 16, 1970
Before McLAUGHLIN, STALEY and ADAMS, *Circuit Judges.*

Opinion of the Court

(Filed August 14, 1970.)

By McLAUGHLIN, *Circuit Judge*.

This matter is before the court on plaintiff administratrix's petition for a writ of mandamus. Petitioner requests us to direct the nominal respondent, a district court judge, to vacate his order of February 16, 1970, transferring this diversity action, pursuant to 28 U. S. C. A. § 1404(a), from the Western District of Pennsylvania to the Western District of Missouri at Kansas City.

I

The use of the mandamus power conferred on this court by the All Writs Act, 28 U. S. C. A. § 1651, can be the indicated remedy to correct an erroneous transfer. Van Dusen v. Barrack, 376 U. S. 612 (1964); Hoffman v. Blaski, 363 U. S. 335 (1960); Swindell-Dressler Corp. v. Dumbauld, 308 F. 2d 267 (3 Cir. 1962); 2 ALR Fed. 573. As Professor Moore has commented:

> "Rulings as to the legal meaning of § 1404(a) have generally been made in prerogative writ proceedings and the consensus of opinion is generally to the effect that such procedure is warranted in a proper case." 1 FEDERAL PRACTICE, § 0.147, 1968 (1964).
>
> * * *
>
> "Circuits have recognized that their power of review by a prerogative writ includes the situation where there is a clear abuse of discretion." (*Id.* at 1969.)

II

Section 1404 of the Judicial Code, Title 28 of the United Stated Code, reads, in pertinent part, as follows:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action *to any other district . . . where it might have been brought.*" (Emphasis supplied.)

The transfer order in this instance simply recited that it was the district court's conclusion that ". . . such transfer is appropriate for the convenience of parties and witnesses in the interest of justice, in light of the circumstances of the case." No mention was made of Subsection's 1404(a) limiting provision to the effect that a transfer is authorized by the statute only if the plaintiff had an "unqualified right" to bring the action in the transferee forum at the time of the commencement of the action; i.e., venue must have been proper in the transferee district and the transferee court must have had power to command jurisdiction over all of the defendants. Van Dusen v. Barrack, *supra;* Hoffman v. Blaski, *supra.* Prior to ordering a transfer the district court must make a determination that the suit could have been rightly started in the transferee district. Jones v. Valley Welding Supply Company, 303 F. Supp. 9 (W. D. Pa. 1969). If there is a "real question" whether a plaintiff could have commenced the action originally in the transferee forum, Leyden v. Excello Corporation, 188 F. Supp. 396 (D. N. J. 1960), it is evident that he would not have an unqualified right to bring his cause in the transferee forum.

The district court's transfer order neither reflects a determination that venue and *in personam* jurisdiction were proper for this case in the Western District of Missouri, nor even intimates that the limiting provision of Subsection 1404(a) was considered by the court. Needless to say, the entry of an order which does not enunciate sound prerequisite determinations motivating a district judge to order a transfer in any particular litigation ren-

ders this court a disservice. In addition, since the district court did not hold the requested hearing in the matter, we do not have the benefit of a transcript which would facilitate our view of its exercise of discretion in this situation.

III

Our necessary *de novo* review of the relevant factors before us leads to the unmistakable conclusion that although venue could have been had in the Western District of Missouri wherein the alleged tortious conduct complained of took place, 28 U. S. C. A. § 1391(a), there is a very real question whether plaintiff could have obtained jurisdiction in Missouri over co-defendant Ace Doran Hauling & Rigging Company, an Ohio corporation. Ace Doran's position is that the plaintiff's action against it is not transferable.

Rule 4(e), Fed. R. Civ. P., provides that plaintiff herein, in attempting to bring defendant Ace Doran before the United States District Court for the Western District of Missouri would have to obtain service of process in accordance with the state long-arm statute.—Defendant Armco Steel is actively engaged in business in Missouri's Western District and was servable there.

Missouri does have a long-arm statute, enacted by the legislature in 1967, Sections 506.500-520 Vernon's Annot. Mo. Statutes, which might possibly subject Ace Doran to *in personam* jurisdiction in the transferee forum. However, when this matter was before the court below the legality of that statute had not been adjudicated, and there were strong doubts as to its validity. As to this, both sides rely on a law review article analyzing the statute, "Expanding Permissible Bases of Jurisdiction in Missouri: The New Long-Arm Statute," 33 Mo. L. Rev. 248 (Spring

1968). The author of that article suggested the following doubts:

> "Exactly how far the statute authorizes Missouri courts to extend jurisdiction and yet remain consistent with the requirements of due process is an open question. . . . Unfortunately, the effort to liberalize jurisdiction over nonresidents may be frustrated by the overly conservative interpretation given to International Shoe by the Missouri courts in the past." At 251.

With substantial doubt cast upon the validity of the then new Missouri long-arm statute it is impossible to accept *what must have been the finding of the district court* that plaintiff had an "unqualified right" to bring her action against Ace Doran in the transferee district.

IV

In reviewing the overall circumstances of this appeal, it is clear that the district court's determination that ". . . such transfer is appropriate for the convenience of parties and witnesses and in the interests of justice . . ." is unfounded; hence, the transfer of the cause under the circumstances was an abuse of discretion.

It is black letter law that a plaintiff's choice of a proper forum is a paramount consideration in any determination of a transfer request, and that choice ". . . should not be lightly disturbed." Ungrund v. Cunningham Brothers, Inc., 300 F. Supp. 270, 272 (S. D. Ill. 1969). In accord with that sound doctrine, one district court recently correctly observed: "The decision to transfer is in the court's discretion, but a transfer is not to be liberally granted." Handlos v. Litton Industries, Inc., 304 F. Supp.

347, 352 (E. D. Wis. 1969). The burden is on the moving party to establish that a balancing of proper interests weigh in favor of the transfer, Everprest, Inc. v. Phillips-Van Heusen Corp., 300 F. Supp. 757 (M. D. Ala. 1969), and ". . . unless the balance of convenience of the parties is *strongly* in favor of defendant, the plaintiff's choice of forum should prevail." Owatonna Manufacturing Company v. Melroe Company, 301 F. Supp. 1296, 1307 (D. Minn. 1969). (Emphasis supplied.)

Applying these principles, the plain facts preclude the transfer which was made. Those facts are: Plaintiff and her decedent were residents of Western Pennsylvania, the decedent worked in Western Pennsylvania, and all of plaintiff's damage and expert liability witnesses resided in Western Pennsylvania. The accident did occur in the transferee district, but it is no more difficult for defendant Armco to bring its three employee liability witnesses to Pittsburgh than it would be for plaintiff to bring her several witnesses to Missouri. Actually, the converse is obvious. The one possible liability Armco-witness not in its employ (Baldwin) seemingly is not now in either Missouri or Pennsylvania, but rather can be located in New Mexico. Finally, any suggestion that trying this claim in Missouri would facilitate the court's "view" of the premises is at the least far-fetched; the accident concerned a heavy piece of machinery which tumbled from a tractor-trailer truck, both of which have been long gone from the scene, although defendant Armco apparently made photographs of that equipment roughly contemporaneously with the mishap. Under the facts, it is inconceivable that "the convenience of parties and witnesses" strongly weighed in favor of a transfer of the action out of plaintiff's rightfully chosen forum.—As the Supreme Court stated in its Barrack opinion, *supra*, at 633-4:

> "There is nothing . . . in the language or policy of § 1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which although it was inconvenient, was a proper venue."

In view of the foregoing, a writ of mandamus, as prayed for by the petition, will issue directing the respondent judge ot vacate and set aside the transfer order of February 16, 1970.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NANCY SCHUTTE, Administratrix of the Estate of Richard E. Schutte, Deceased,

Plaintiff,

v.

ARMCO STEEL CORPORATION,

Defendant & Third-Party Plaintiff,

and

ACE DORAN HAULING & RIGGING CO., a corporation,

Defendant,

v.

TIPPINS MACHINERY CO., INC., a Pennsylvania corporation,

Third-Party Defendant.

Civil Action No. 69-874.

Order

AND NOW, this 16th day of February 1970, upon consideration of defendant's motion for transfer under 28 U. S. C. 1404(a), and of briefs in support thereof and in opposition thereto, and the Court being of opinion that such transfer is appropriate for the convenience of parties and witnesses in the interest of justice, in the light of the circumstances of the case,

IT IS ORDERED that the above styled cause be and the same hereby is transferred to the Western District of Missouri sitting at Kansas City.

/s/ DUMBAULD,
United States District Judge.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NANCY SCHUTTE, Administratrix of the Estate of Richard E. Schutte, Deceased,
Plaintiff,

v.

ARMCO STEEL CORPORATION,
Defendant & Third-Party Plaintiff,
and
ACE DORAN HAULING & RIGGING CO., a corporation,
Defendant,

v.

TIPPINS MACHINERY CO., INC., a Pennsylvania corporation,
Third-Party Defendant.

Civil Action No. 69-874.

Order

AND NOW, this 2nd day of March 1970, upon consideration of plaintiff's motion for reconsideration of this

Court's order of transfer of February 16, 1970, and the Court being of opinion that no sufficient ground therefor has been shown,

IT IS ORDERED that said motion be and hereby is denied.

/s/ DUMBAULD,
United States District Judge.

Issues Presented

A. Should Plaintiff-Petitioner Have Proceeded Pursuant To 28 U. S. C., § 1292(b) In Challenging The Change Of Venue Granted In Civil Action No. 69-874, Below?

B. Should The Equitable Doctrine Of Mandamus Apply In Favor Of The Plaintiff-Petitioner In Regard To The Facts And Circumstances Surrounding Civil Actions Nos. 69-874 And 70-206, Below?

C. On The Facts Presented, Has The Petitioner Shown, Clearly And Indisputably, A Judicial Usurpation Of Power, And In The Requisite "Really Extraordinary" Context?

D. Is "Abuse Of Discretion" Subject To Review On Mandamus, And If So, Was There Any Such "Abuse Of Discretion" Below?

E. Was The District Court's Declination Of Oral Argument Constitutionally Or Otherwise Prejudicial To The Plaintiff-Petitioner?

F. Does The United States District Court For The Western District Of Missouri Possess Venue And Jurisdiction As To Respondents, Ace Doran And

Tippins, Thereby Rendering Civil Action No. 69-874 Presently Transferable *In Toto* Under The *Hoffman v. Blaski* Doctrine?

G. May This Court Treat Plaintiff-Petitioner's Claim Against Armco At Civil Action No. 69-874 As *Severed* From Her Claim Against Respondent Ace Doran, Thereby Releasing The Former Claim To The Western District Of Missouri And Retaining The latter Claim In The Western District Of Pennsylvania For Dismissal Or Summary Judgment Disposition?

Excerpt from the Missouri Long-Arm Statute

Section 506.500, Vernon's Annot. Mo. Statutes, provides that:

"1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or *through an agent* does any of the acts enumerated in this section, thereby submits such person, firm, or corporation . . . to the jurisdiction of the courts of this states as to any cause of action arising from the doing of any such acts:

(1) The transaction of any business within this state;

(2) The making of any contract within this state;

(3) The commission of a tortious act within this state;

•
•
•

2. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section. Laws 1967, p. 660, § 1."

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IN THE

Supreme Court of the United States

October Term, 1970

No. 944

ARMCO STEEL CORPORATION,
Petitioner,
and
HONORABLE EDWARD DUMBAULD, Judge, United States District Court for the Western District of Pennsylvania,
Nominal Petitioner,
v.
NANCY SCHUTTE, Administratrix; ACE DORAN HAULING & RIGGING COMPANY,
and
TIPPINS MACHINERY COMPANY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1970

No. 944

ARMCO STEEL CORPORATION,

Petitioner,

and

HONORABLE EDWARD DUMBAULD, Judge, United States District Court for the Western District of Pennsylvania,

Nominal Petitioner,

v.

NANCY SCHUTTE, Administratrix; ACE DORAN HAULING & RIGGING COMPANY,

and

TIPPINS MACHINERY COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

Counter-Statement of Questions for Review

1. Whether it is proper and within the power of the Court of Appeals to issue a writ of Mandamus to a District

Court Judge where he has exceeded his legal powers and abused his discretion in issuing an order transferring a case to a forum other than the one of plaintiff's choice.

2. Whether plaintiff was required to undertake the futile act of petitioning by it the District Court to certify that an immediate appeal should be allowed by it from an interlocutory order (under 12 USC 1292 (b)) before she could seek relief through a writ of Mandamus.

Statement of the Case

The Schutte family, including the deceased husband-father, Richard, resided in the Pittsburgh, Pennsylvania area. Deceased was employed by the third-party defendant, Tippins Machinery Company, a Pennsylvania corporation engaged in business in suburban Pittsburgh.

On the date of his fatal accident, Mr. Schutte was sent by his employer to the Kansas City, Missouri plant of defendant, Armco Steel Company, to observe and check a trailer truck load of used machinery which Tippins was purchasing from Armco. The trailer was being loaded in the Armco plant by three of its employees, who were using an overhead electric crane. Schutte was standing on the floor of the plant next to the bed of the trailer and was checking off the material as it was loaded. Several hours before the accident occurred Armco employees had loaded a 4,000 pound "run-out-table" onto the trialer. Depositions taken by plaintiff of the three employees demonstrated that the heavy parts hanging from the moving crane had struck and overturned the run-out-table upon Schutte. He was killed instantly.

A number of photographs of the scene were taken by Armco shortly after the occurrence and these were put in evidence at the depositions.

The only witness other than the Armco employees was the truck driver, Walter Baldwin, who resided in New Mexico when last heard from. He was an employee of Belger Cartage Service, Inc., of Kansas City, a hauling concern.

Several days after the accident, Baldwin operated the tractor-trailer and the load of machinery to the Tippins Company, in Pittsburgh. The truck was operated from Illinois to Pittsburgh under the ICC permit of the defendant, Ace Doran Hauling & Rigging Company, an Ohio corporation, which actively engages in business in Western Pennsylvania but has neither an office nor engages in business in Missouri.

Mrs. Schutte, as administratrix of her husband's estate, filed this action in the Western District of Pennsylvania on July 22, 1969, against both Armco and Ace Doran, claiming damages under the Pennsylvania Survival Act and the Wrongful Death Statute. Armco is incorporated in Ohio and it operates large manufacturing plants in Western Pennsylvania.

No steps were taken to transfer this action from Pennsylvania to Missouri for approximately six months after the suit was filed. During this time, Armco conducted extensive legal activity in the case, including the filing of pleadings, the presenting and answering of interrogatories, the bringing of Tippins into the case as a third-party defendant and the filing of a petition to bring in Belger Cartage as a third-party defendant on the ground that it conducted its business in Western Pennsylvania. (This motion has not been passed upon.) Armco avers that Tippins, which neither has a place of business nor conducts its operations in Missouri, undertook by written agreement to indemnify Armco for damages resulting to it in a case such as the present one. Tippins denies this.

District Court Judge Edward Dumbauld did not pass upon plaintiff's objection to the transfer motion on the ground that the suit could not be transferred because it could not have been brought originally in Missouri (28 USC 1404 (a)). Neither Tippins nor Ace Doran were subject to jurisdiction or venue in Missouri. Upon petition and after consideration of written briefs and oral arguments, the Court of Appeals for the Third Circuit, consisting of Judges McLaughlin, Staley and Adams, issued a writ of Mandamus to Judge Dumbauld directing that he rescind his order of transfer. The order was rescinded.

Summary of Argument

The District Court Judge exceeded his legal power and also abused his discretion in issuing an order transferring this case to Missouri, a state in which the action could not have been brought. Two of the parties in the litigation could not have been sued by plaintiff in Missouri. Furthermore, an overwhelming hardship would result to plaintiff if this case were transferred, and only minimum inconvenience would be caused to defendant Armco if the case is tried in the forum of original suit. A transfer would not be for the convenience of the parties or witnesses or in the interest of justice.

It was not required by law and would have been a futile gesture for plaintiff to seek leave of the District Court Judge to allow an interlocutory appeal on the ground that a controlling question of law was involved.

There is no substantial difference between the decisions of the several Circuit Courts on the application of the All Writs section of the Code (28 USC 1651 (a)). Where a District Court has exceeded its power or clearly abused it's discretion in ordering the transfer of a case.

ARGUMENT

I.

Where the Lower Court exceeded its power and abused its discretion in transferring the above case to another forum, did the Court of Appeals properly issue a Writ of Mandamus?

Your Honorable Court has reviewed many cases wherein Courts of Appeal have passed upon Petitions for Mandamus where the District Court had granted or refused petitions to transfer cases to another forum under USC Section 1404 (a). Respondent refers to the following authorities:

Van Dusen v. Barrack, 376 U. S. 612; 86 Supreme Court 805;

Hoffman v. Blaski, 363 U. S. 335; 80 Supreme Court 1084;

Moore's Federal Practice, Second Ed., Vol. 1, Sec. 0.147 (p. 1968);

Change of Venue, Mode of Review, 2 ALR, Fed. 573, 599.

This Court has approved the use of the Mandamus writ as a proper exercise of authority under Section 1651 (a) of the Code where a District Court has exceeded its power in granting or refusing a transfer. A long list of cases in the Court of Appeals establishes this as a proper method of review under such circumstances.

The defendant-petitioner concedes that the writ of Mandamus is properly invoked where the inferior court has exceeded its authority by a usurpation of judicial power.

Judge Dumbauld's transfer order was in violation of a specific limitation of his authority. Section 1404(a) limits

the right to transfer a case to a district where the action "might have been brought." The present action could not have been brought against either the original defendant, Ace Doran, or the additional defendant, Tippins, in Missouri.

To justify its transfer motion Armco referred to the new Missouri long-arm statute (Sec. 506.500-520 Vernon's Annot. Mos. Statutes). The statute had not even been referred to in the lower court.

There is certainly a real question as to whether plaintiff had an 'unqualified right' to bring her suit in Missouri, as was stated by the Court of Appeals (Petitioner's Brief, p. 18).

Petitioner urges that Ace Doran brought itself within the reach of the long-arm statute because contractual arrangements for the interstate shipment were allegedly made in Missouri. Plaintiff disagrees with this statement. There was no such proof in the record. Petitioner presented this argument to the Court of Appeals in its brief (pp. 28, 29) and the thread upon which it sought to support the conclusion is an interrogatory answer made by Tippins. This company said that Schutte is the only person "who might have communicated with Belger or Ace Doran" and that "Tippins has no knowledge as to whether Schutte did or did not have any such communication." From this petitioner argued that Schutte did consummate a contract in Missouri.

This Court has recognized the right of a Circuit Court to issue a writ of Mandamus to the lower court when the latter has abused its discretion in issuing a transfer order. This Court said in *Bankers Life & Casualty Co. v. Holland*, 346 U. S. 379; 74 S. Ct. 145, that the writ is to be

used where there is a "clear abuse of discretion or 'usurpation of judicial power'" (p. 148).

In this case the Court of Appeals based its decision in substantial part on the ruling that the District Court as a matter of law could not transfer the present case to Missouri. The several cases cited by petitioner in support of its argument that the Court was making a *de novo* review are not in point. Most of these cases involve the question of whether a District Court had properly evaluated certain factors in making its decision as to the transfer of a case. Such was not involved here where the District Court had ignored the statutory restrictions and limitations on its power.

After reviewing the facts of the present case the Court of Appeals properly said that "it is inconceivable that 'the convenience of the parties and witnesses' strongly weighed in favor of the transfer of the action of plaintiff's rightfully chosen forum" (See explanation in Petitioner's Brief, p. 21). For this second reason, the Court properly issued a writ of Mandamus.

-a-

The Second Action Filed by Plaintiff

Petitioner has attempted to weave an argument to support its petition for certiorari out of the fact that plaintiff elected to file an action in the state court (a cautionary suit) against Armco alone, after Armco had filed its petition to transfer the first action to Missouri. Defendant immediately removed the second suit to the District Court and it was designated as Civil Action No. 70-206. There is no relation whatsoever between this petition for certiorari, which concerns only the action at Civil Action No. 69-874, and the second suit which plaintiff filed.

Upon the filing of the state court action, and Armco's removal of it to the District Court, plaintiff immediately filed a motion for leave to discontinue the suit. Armco then filed a motion to transfer the second action to Miscouri. District Court Judge Rosenberg refused both motions and no further action was taken with reference to either of them.

II.

No substantial conflict exists among Courts of Appeals relative to any alleged requirement that one resort to an appeal under 28 U. S. C. 1292 (b) as a pre condition to a Mandamus Petition.

It would have been useless and futile for plaintiff to ask Judge Dumbauld to declare a controlling question of law existed which required an immediate review under Section 1292 (b) of his transfer order. The lower court considered the issues involved in the transfer matter of so little concern that the Judge not only heard no testimony but refused plaintiff's request for leave to present an oral argument on the issues. After granting the transfer he refused plaintiff's motion for reconsideration of it.

No rule or statute requires that one first seek relief under Section 1292(b) before he can invoke the All Writs section, 1651 (a). The Second Circuit has specifically stated that no such circuitous procedure is required. *Golconda Mining Corp. v. Herlands*, 365 F. 2d 856 (C. A. 2, 1966) The cases cited by petitioner do not support its argument. *Rapp v. Van Dusen*, 350 F. 2d 806 (C. A. 3, 1965), involving an issue as to whether a judge who had been a nominal party in litigation should continue to preside in subsequent phases of it. He refused to disqualify himself. A Petition

for a Writ of Mandamus was presented and granted by the Appellate Court. The majority opinion writer suggested that in such cases a Petition for Mandamus should allege that an unsuccessful request for relief was made under Section 1292 (b) or "why such an application was inappropriate in the circumstances" (p. 813).

If the respondent-plaintiff had followed such a procedure and if no stay had been allowed in the meantime, the present action would have been transferred to Missouri before a Mandamus Writ was secured.

Next cited by petitioner is *Farrell v. Wyatt*, 408 F. 2d 662 (C. A. 2, 1969). The Court there held that relief under Section 1292 (b) is not the exclusive procedure for seeking review of a transfer order (p. 665).

Finally cited was *Panhandle Eastern Pipelines v. Thornton*, 267 F. 2d 459 (C. A. 6, 1959), where the Circuit Court refused Mandamus because the lower court had not abused its discretion or usurped its legal power.

Respondent refers the Court to *A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F. 2d 439 (C. A. 2, 1966).

Conclusion

There has been no final judgment entered in this case. The Court of Appeals acted upon an interlocutory issue. Rule 20 of This Court is particularly applicable. The writ of certiorari will not be granted under these circumstances unless imperative public importance justifies the deviation from normal appellate procedure and requires immediate settlement in this Court. The present case is not in that category.

Respectfully submitted,

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December 1970.